Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

CHRISTY L. JACO,
PETITIONER

v.

STATE OF MISSOURI,
RESPONDENT

On Petition For Writ Of Certiorari
To The Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Whether Section 557.036 of the Missouri Statutes violates Ms. Jaco's Fifth, Sixth and Fourteenth Amendment rights when it does not require a jury to find evidence offered in aggravation of punishment beyond a reasonable doubt when the jury's recommended sentence results in the maximum sentence that a trial court may impose and therefore creates a sentencing ceiling.**
2. **Whether Ms. Jaco's Fifth, Sixth and Fourteenth Amendment rights were violated when the trial court disallowed the admission of photographs because the furnishings present at the time of the sole eye witness' claimed observation were different from that present in the offered photograph when that photograph was the only photograph that depicted that witness' line-of-sight and demonstrated that it was impossible for the witness to have made the claimed observation due to his view being obstructed by a wall.**

PARTIES TO PROCEEDING

The parties to the proceeding are set forth in the caption to this case and are Petitioner, Christy L. Jaco, with Terry J. Flanagan, the counsel of record and John W. Peel. The Respondent is the State of Missouri, and is represented by the Missouri Attorney General's Office, Jeremiah W. (Jay) Nixon.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceeding ii
Table of Contents iii
Table of Authorities iv
Citations to Official Reports v
Basis of Jurisdiction vi
Constitutional Provisions vii
Argument
Statement of the Case 1
First Question Presented 5
Second Question Presented 18
Conclusion 27
Appendix
Denial of Motion for Reconsideration .. A1
Missouri Supreme Court Opinion A3
Motion for Reconsideration A15

TABLE OF AUTHORITIES

Constitutional

U.S. Const. amend V 5, 19
U.S. Const. amend VI 6, 20
U.S. Const. amend XIV 6, 20

Statutory Authority

V.A.M.S., § 557.036 (2003) 6
V.A.M.S., § 558.011 (2003) 8
V.A.M.S., § 568.060 (1997) 8

Case Law

Apprendi v. New Jersey, 530 U.S. 466 (2000) .. 9, 12, 13, 14
Crawford v. Washington, 124 S.Ct. 1354 (2004).20
Davis v. Alaska, 415 U.S. 308 (1974) 24, 25, 26
Delaware v. Van Arsdall, 475 U.S. 673 (1986) . 19, 23, 24
Harris v. United States, 536 U.S. 545 (2002).... 9, 10, 11, 12
Hicks v. Oklahoma, 447 U.S. 343 (1980) 9, 10
Jones v. United States, 526 U.S. 227 (1999) 16
McMillan v. Pennsylvania, 477 U.S. 79 (1986) .. 9
Olden v. Kentucky, 488 U.S. 227 (1988) 19, 22, 23
Ring v. Arizona, 566 U.S. 584 (2002) 15
State v. Driscoll, 55 S.W.3d 350 (Mo. 2001) 19
State v. Samuels, 88 S.W.3d 71 (Mo. Ct. App. 2002) 22
State v. Williams, 849 S.W.2d 575 (Mo. Ct. App. 1993) 20, 21
United States v. Booker, 125 S.Ct. 738 (2005) . 7, 16, 17

CITATIONS TO OFFICIAL REPORTS

State of Missouri v. Christy L. Jaco, 156 S.W.3d 775 (Mo. 2005)

BASIS OF JURISDICTION

Ms. Christy Jaco seeks review of the Missouri Supreme Court's decision entered on January 11, 2005, which affirmed her conviction for Abuse of a Child and her twenty (20) year prison sentence. Ms. Jaco timely filed her Motion for Rehearing/Reconsideration, and same was denied on or about March 1, 2005. Thus, this Court properly possesses jurisdiction to review this matter pursuant to 28 U.S.C., § 1257 and other like statutes.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

U.S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Christy Jaco, was found guilty of Abuse of a Child on July 20, 2003 and is now serving a twenty (20) year sentence within the confines of the Missouri Department of Corrections.

It was uncontested at trial that Zachary Brooks, Christy's Jaco's one-year old son, suffered severe injuries on November 21, 2001, that were consistent with Shaken Baby Syndrome, and that these same injuries ultimately resulted in his death. However, what was hotly contested at trial was who was responsible for causing these injuries; Christy Jaco or Matthew Eckhoff, Ms. Jaco's live-in boyfriend.

Ms. Jaco will not recite a full statement of the facts in this case, but rather will limit same to the core facts surrounding the two (2) questions presented.

Mr. Eckhofff stated that he witnessed Ms. Jaco, while standing between the couch and the coffee table located in their apartment, pick Zachary up off of the couch from her left side. He then states that Ms. Jaco held Zachary, with arms extended at shoulder height, and shook Zachary back and forth. In fact, in one of Mr. Eckhoff's statements he indicated that Ms. Jaco, while shaking the twenty-five (25) pound child, held a finger to her mouth. Mr. Eckhoff further indicated that when this shaking occurred Ms. Jaco was facing the bedroom and therefore the outstretched arms would be extended away from the window and towards the bedroom and he viewed Ms. Jaco's right side. Ms. Jaco then, as recalled by Mr. Eckhoff, takes Zachary into Zachary's bedroom. Mr. Eckhoff then hears three thumps. Ms. Jaco leaves the room and tells Mr. Eckhoff that Zachary is finally asleep.

Mr. Eckhoff now leaves the kitchen area. He did not call 911. He did not call the Division of Family Services. In fact, he then simply laid down on the couch and began to read a book.

At some subsequent point in time that same night, while Ms. Jaco was at work, Mr. Eckhoff claims to hear Zachary cough. Mr. Eckhoff then states that he enters Zachary's room and finds him seizing and struggling for breath. Mr. Eckhoff claims that he then shakes Zachary for a few "moments" which he defines as minutes, he pats him on the back, puts him to the ground and hears a popping sound as Zachary's head hits the floor, and then attempts to give Zachary mouth-to-mouth resuscitation. According to Mr. Eckhoff's testimony, these actions all take place in a twenty (20) minute time span. He eventually telephones Ms. Jaco at her work and she immediately instructed him to contact 911. He does so and ambulance arrives taking Zachary to the hospital for care. Eventually it is determined that the injuries sustained caused brain death and were the direct result of acts consistent with Shaken Baby Syndrome.

Mr. Eckhoff was taken into custody where he made four (4) different statements concerning the events, with the last statement being the first time in which he describes some type of act committed by Ms. Jaco. Further, this statement against Ms. Jaco was only made when the investigating officers informed Mr. Eckhoff that they did not believe him based upon the information given by the treating doctors about the injuries and the manner in which they could be caused and Mr. Eckhoff was then supplied with the specific injuries and the specific manner by these same officers. Only after being so informed did Mr.

Eckhoff make the aforementioned claim that Ms. Jaco was the cause of the injuries and described the manner in which same occurred.

In reliance upon Mr. Eckhoff's consent, the investigating officers entered the apartment and took several photographs, which were taken from various positions and angles. Unfortunately, not one of these photographs depicted the line of sight from Mr. Eckhoff's claimed location in the kitchen to Ms. Jaco's alleged location in the living room.

Mr. Eckhoff and Ms. Jaco, obviously, in light of the events, split as a couple, vacated the apartment and returned the apartment to their landlord's possession and control. This apartment was then rented to another tenant with the new tenant's furniture put in place; but the layout/floor plan remained the same throughout all relevant times.

The formal indictment was returned only after the apartment was surrendered by Mr. Eckhoff and Ms. Jaco and at this point in time Ms. Jaco is first informed of and provided with the discovery materials, which included the aforementioned apartment photographs taken by the police officers.

Armed with this information and the photographs, Ms. Jaco employed the assistance of Mr. Robert Thomure, an investigator, and contacted the new tenant of the apartment in question. This tenant granted access to the apartment for the purpose of taking photographs, measurements and video of the apartment layout; the photograph in question demonstrated that Mr. Eckhoff could not have made the claimed observation because a wall completely obstructed his view. The photograph in

question was denied admission by the trial court because the furnishings in the photograph were different from those present at the time Mr. Eckhoff and Ms. Jaco resided there. There was no argument presented by either Ms. Jaco or the State that the floor plan or physical layout of the apartment was different in either the State's photographs or the proposed photographs. During deliberations, the jury requested the apartment photographs for their review.

Also prior to trial, a motion to declare Section 557.036 unconstitutional was filed on Ms. Jaco's behalf. This motion was denied by the trial court. After several days of trial, the jury returned a verdict of guilty. The matter proceeded to the second phase/punishment phase as required by Section 557.036. Once again, Ms. Jaco by counsel objected to the statute and the bifurcation of this cause, which was, once again, denied by the court.

During the penalty phase, the State offered evidence in aggravation of Ms. Jaco's punishment. However, no instruction given during the penalty phase provided guidance as to the burden of proof that the jury must employ when considering evidence offered to enhance/aggravate the punishment. In an effort to cure this deficiency, Ms. Jaco offered an instruction that required the jury to find evidence in aggravation of punishment beyond a reasonable doubt. This instruction was refused. The jury was unable to agree upon a sentence following this second phase.

The Missouri Supreme Court considered Ms. Jaco's arguments but ultimately affirmed her conviction and sentence. A timely Motion for Reconsideration was filed and that Motion was denied on March 1, 2005.

This Petition for Writ of Certiorari follows.

ARGUMENT

1. **Whether Section 557.036 of the Missouri Statutes violates Ms. Jaco's Fifth, Sixth and Fourteenth Amendment rights when it does not require a jury to find evidence offered in aggravation of punishment beyond a reasonable doubt when the jury's recommended sentence results in the maximum sentence that a trial court may impose and therefore creates a sentencing ceiling.**

The first issue is whether Section 557.036 of the Missouri Statutes is unconstitutional because proof beyond a reasonable doubt is not required when a jury considers evidence in aggravation of punishment. A trial court may not impose a sentence greater than that recommended by a jury in Missouri and therefore said recommendation is a sentencing ceiling. Unfortunately, this statute provides no procedural safeguard to a defendant because no guidance is given to the jury as to the specific level of proof and burden of persuasion that must be satisfied in examining evidence in aggravation of a defendant's punishment.

Due Process and Jury Trial are Constitutional Guarantees

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law." U.S.C.A., *Const. Amend. V.* The Fourteenth Amendment of the United States Constitution provides that " [n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S.C.A. *Const. Amend. XIV.* The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." U.S.C.A. *Const. Amend. IV.*

Section 557.036

Section 557.036 of the Missouri Statutes completely altered the trial procedure for a Missouri criminal defendant with no criminal history or conviction by bifurcating the procedure into two separate phases: a guilt phase and a penalty phase. V.A.M.S. § 557.036 (2003). The particular subsection of this amended statute governing the penalty phase procedure provides that:

> If the jury at the first stage of a trial finds the defendant guilty of the submitted offenses, the second stage of the trial shall proceed. The issue at the second stage of the trial shall be the punishment to be assessed and declared. Evidence supporting or mitigating punishment may be presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon

> the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. The court shall instruct the jury as to the range of punishment authorized by statute for each submitted offense. The attorneys may argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The jury shall assess and declare the punishment as authorized by statute.

V.A.M.S., § 557.036.3 (2003).

But this statute does not provide guidance to a jury advising them of the specific level of proof they must employ in reviewing the evidence in aggravation of punishment, not proof beyond a reasonable doubt let alone even proof by a preponderance of the evidence.

Missouri Jury Sentencing

As stated above, in Missouri, a jury's recommended sentence is the maximum sentence that a trial court may impose and therefore serves as a sentencing ceiling. In light of this ceiling, Ms. Jaco's Sixth Amendment rights are implicated because of her statutory right to said sentencing. United States v. Booker, 125 S.Ct. 738, 749

(2005). It is Ms. Jaco's contention that where the applicable statute provides a right to a jury sentence recommendation that serves as a maximum/cap for the defendant's sentence, the facts relied upon must be found beyond a reasonable doubt and failure to do so results in a constitutional violation. This did not take place in Ms. Jaco's case and the jury was never informed about a burden of proof that it was employ when considering facts in aggravation of punishment in arriving at its recommended sentence.

Ms. Jaco was charged with the class A felony of Abuse of a Child pursuant to Section 568.060. V.A.M.S., § 568.060 (1997). The authorized term of imprisonment for a class A felony is "a term of years not less than ten years and not to exceed thirty years, or life imprisonment." V.A.M.S., § 558.011 (2003). However, Section 557.036.5 provides the true statutory maximum in this same setting, which is dependent upon the jury's recommendation. That Section provides that "[i]f the jury returns a verdict of guilty in the first stage and declares a term of imprisonment in the second stage, the court shall proceed as provided in subsection 1 of this section except that any term of imprisonment imposed cannot exceed the term declared by the jury unless the term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term of imprisonment greater than the lowest term provided for the offense."

The following will assist in illustrating the difference between penalty phase evidence in Missouri and sentencing factors in Missouri. It is undisputed that the statutory authorized maximum sentence that jury may

consider in this case was thirty (30) years or life in prison. However, if a jury recommended punishment of twenty (20) years, this recommendation serves as the statutory maximum sentence that the trial court may impose and therefore the facts relied upon by the jury must be found beyond a reasonable doubt. Further, any fact relied upon by the trial court in imposing and executing the sentence within the lawful range in this same scenario, in other words ten (10) years to twenty (20) years, may be found by the trial court by a preponderance of the evidence in accord with Harris v. U.S., 536 U.S. 545 (2002) and McMillan v. Pennsylvania, 477 U.S. 79 (1986).

Therefore, while Section 558.011 provides the maximum statutory penalty that a jury may consider in assessing punishment, the jury's recommendation, pursuant to Section 557.036.5, serves as the true statutory sentencing ceiling that may be imposed by the trial court. See Hicks v. Oklahoma, 447 U.S. 343, 347 (1980) (holding that due process violation occurred when statutory right to jury sentencing was violated where jury's verdict would serve as the maximum sentence the defendant could receive). Due to the importance of the jury's recommendation, the procedure and manner in which the jury reviews the evidence in recommending a sentence is critical so that a defendant's constitutional and statutory rights are not violated.

Burden of Proof - Reasonable Doubt Required

If the evidence presented in the penalty phase is a fact that increases the penalty for a crime beyond the statutory maximum, then that evidence must be submitted to the jury and found beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

However, if the penalty phase evidence only involves sentencing factors, which do not increase the statutory maximum penalty, then the evidence need only be found by a preponderance of the evidence. Harris, 536 U.S. at 568.

SENTENCING FACTORS - MINIMUM PUNISHMENTS

Sentencing factors were discussed by this Court in McMillan. In that case, the statute in question provided a statutory minimum sentence of five (5) years if the trial court found by a preponderance of the evidence at sentencing that a defendant visibly possessed a firearm. McMillan, 477 U.S. at 81. The Court recognized that the statute did not affect the maximum sentence applicable for the crime, but rather only affected the minimum sentence that a trial court may impose. Id. at 88. In fact, the Court, in reconciling the difference, stated that the statute's constitutionality would be called into question "if a finding of visible possession exposed them to greater or additional punishment." Id. Ultimately the statute was upheld and the defendant's conviction affirmed because the visible possession of a firearm was only a sentencing factor, which raised the minimum sentence, and may be found by the trial court at sentencing by a preponderance of the evidence. Id. at 91.

In Harris, the Court again addressed sentencing factors that affected the minimum sentence that a trial court may impose. In that case, the defendant's complaint involved the sentencing judge finding that he possessed a firearm in connection with a controlled substance offense, which then results in the minimum sentence being five (5) years. 536 U.S. at 550-551. In reviewing this claim, the Court initially stated the following:

> After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements ... The statutes do not require these facts, sometimes referred to as sentencing factors, to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt.

Id. at 549-550.

The Harris Court distinguished the holding in Apprendi because the former affected minimum sentences while the latter affected maximum sentences. Id. at 557. Thus, facts found by the sentencing judge in affixing punishment within the authorized statutory range does not invoke the reasonable doubt requirements of the Fifth Amendment and/or the Sixth Amendment. Id. at 559. The Court also discussed the facts that must be found beyond a reasonable doubt, which include facts essential in

assessing punishment and affect the maximum penalty. Id. at 561. Ultimately, in affirming the procedure in place, while also affirming the holdings in McMillan and Apprendi, the Court stated:

> Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion – and rely upon judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings.

Id. at 567.

REASONABLE DOUBT - MAXIMUM SENTENCE/AGGRAVATION

In Apprendi, 530 U.S. 468-469, the defendant entered a plea of guilty to a crime that provided a punishment range of five (5) years to ten (10) years. However, another statute provided a statutory enhancement of that range, with the new range being ten (10) years to twenty (20) years, if the trial court found by a preponderance of the evidence that the crime was racially motivated. Id. Ultimately, the trial court found that the hate-crime enhancement applied and sentenced the

defendant to twelve (12) years. Id. at 471.

The United States Supreme Court stated that it is permissible for sentencing courts to exercise discretion and consider "various factors relating both to offense and offender - in imposing a judgment *within the range* prescribed by statute." Id. at 481 (emphasis in original). In fact, "[t]he historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Id. at 482-482 (emphasis in original).

The Court echoed its previous holdings that due process and the accompanying jury protections include the finding of guilt or innocence as well as the determination of a defendant's sentence. Id. at 484. The holding in McMillan was also reaffirmed and distinguished because McMillan involved minimum sentences while the facts before the Apprendi Court involved maximum sentences. Id. at 486-487.

Ultimately, the New Jersey enhancement procedure was struck down and the Court held that:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

> doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id. at 490.

Justice Scalia's concurring opinion, that Justice Thomas joined, in this 5-4 decision is extremely enlightening as to the matters that are elements of a crime and those facts that are merely sentencing factors. Initially, Justice Scalia recognized that sentencing factors are facts that may increase a defendant's sentence and are not subject to "the constitutional protections to which elements are subject." Id. at 500. In describing the differences between "elements" of a crime and "sentencing factors", it was stated that:

> This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the

> legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime ... One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

Id. at 501.

Thus, determining the applicable sentencing range requires proof beyond a reasonable doubt while imposing a sentence within that range does not implicate constitutional protections requiring that same level of proof. Proof beyond a reasonable doubt is required in proving elements of a crime, which includes any fact that "is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement." Id. at 521. See also Ring v. Arizona, 536

U.S. 584, 602 (2002) (holding that a defendant's right to proof beyond a reasonable doubt included the jury's finding of an aggravating circumstance and that the primary focus is upon the procedure's effect and "[i]f a State makes an increase in a defendant's authorized punishment contingent on the findings of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt").

In United States v. Booker, 125 S.Ct. 738 (2005), this Court held that "[f]oreshadowing the result we reach today, we noted that our holding were consistent with a 'rule requiring jury determination of facts that raise a **sentencing ceiling**' in state and federal sentencing guidelines systems." Id. at pg. 6 *citing* Jones v. United States, 526 U.S. 227, 230 (1999) (emphasis added).

The Booker Court, in declaring that the United States Sentencing Guidelines are advisory, echoed its previous holdings that evidence relied upon in aggravation of punishment must be presented to a jury and found beyond a reasonable doubt. In fact, the Booker Court interpreted its Ring decision as requiring any fact that increases a defendant's authorized punishment and therefore sentence must be found by a jury beyond a reasonable doubt when it quoted that holding stating that "'[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt.' Our opinion made it clear that ultimately, while the procedural error in Ring's case might have been harmless because the necessary finding was implicit in the jury's guilty verdict, 'the characterization of a fact or circumstance as an 'element' or a 'sentencing

factor' is not determinative of the question 'who decides,' judge or jury.'" Booker, 125 S.Ct. at 749.

The Booker Court further interpreted its prior holdings in Jones, Apprendi and Ring and stated that the defendant has a Sixth Amendment right to "have the jury find the existence of 'any particular fact' that the law makes essential to his punishment." Id.

Again, a Missouri jury's recommended sentence is the sentencing ceiling and a trial court is powerless to impose a sentence greater than said recommendation, regardless of the range of punishment authorized for a particular crime. While the trial court in Jaco's case would possess broad discretion in imposing a sentence between the statutory minimum and the jury recommended sentence, which serves as the ceiling, the facts relied upon in arriving at the ceiling must be proven beyond a reasonable doubt.

2. **Whether Ms. Jaco's Fifth, Sixth and Fourteenth Amendment rights were violated when the trial court disallowed the admission of photographs because the furnishings present at the time of the sole eye witness' claimed observation were different from that present in the offered photograph when that photograph was the only photograph that depicted that witness' line-of-sight and demonstrated that it was impossible for the witness to have made the claimed observation due to his view being obstructed by a wall.**

The next question presented by Ms. Jaco is whether the trial court committed reversible error when it refused to admit Defendant's Exhibit J, which was the only photograph depicting the sole eye-witness' true line of sight. The crux of this issue is prohibiting a defendant from presenting relevant and critical evidence in her own behalf and in her defense.

Several photographs of the apartment were taken by the investigating officers and included those offered by the State and admitted into evidence where those photographs were taken shortly following Zachary Brooks sustaining his injuries. However, not one of the State's photographs depicted Mr. Eckhoff's line of sight from where he claimed Ms. Jaco was located to where he claimed he was leaning, living room couch to kitchen-sink, but rather the photographs demonstrated a view from other and different locations in the living-room area to kitchen.

Because no photograph was taken that actually shows the witness' line of sight and his inability/ability to make the claimed observation, Ms. Jaco spoke with the new apartment tenant and was given permission to take

photographs, which included Exhibit J. When Exhibit J was offered into evidence the trial court refused its admission and presentation to the jury solely because the furnishings in the apartment had changed. However, the floor plan remained consistent in all photographs; no party argued that the floor plan of the apartment, including the wall and sink in question, were different in either photograph, and if such an argument were tendered it would be factually inaccurate.

The trial court's refusal to receive the photograph into evidence destroyed Ms. Jaco's right to confront, cross-examine, contradict and impeach the credibility of her sole accuser and the State's chief witness, Matthew Eckhoff, and to present evidence in her own behalf which rights are guaranteed to her by the United States Constitution and the Missouri Constitution.

When trial court's evidentiary ruling involves a violation of the United States Constitution Due Process Clause and/or Confrontation Clause the appropriate standard of review is that Ms. Jaco's conviction must be set aside unless this Court determines beyond a reasonable doubt that the trial court error was harmless. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986); Olden v. Kentucky, 488 U.S. 227, 233 (1988); State v. Driscoll, 55 S.W.3d 350, 356 (Mo. 2001) *citing* Neder v. United States, 527 U.S. 1, 15-16 (1999).

Due Process Clause and Confrontation Clause

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of

law." U.S.C.A., *Const. Amend. V.*

The Fourteenth Amendment of the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S.C.A. *Const. Amend. XIV.*

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." U.S.C.A. *Const. Amend. IV.* "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." Crawford v. Washington, 72USLW 4229, 124 S.Ct. 1354, 1359 (2004).

Photograph Exclusion and Error

The question involves the trial court's error in refusing to admit Exhibit J into evidence because the apartment furnishings were different, yet the floor plan remained unchanged. It is clear that trial court error occurred in that any change in the furnishings depicted in the photograph simply goes to the weight that the evidence receives and does not effect its admissibility as stated below.

As an example of the changed conditions depicted in a photograph Ms. Jaco first brings this Court's attention to State v. Williams, 849 S.W.2d 575 (Mo. Ct. App. 1993). In that case the issue before the court was whether the trial court erred in admitting photographs of the crime scene when it was claimed that the photographs misrepresent that scene "because the trees were portrayed without leaves, while they had leaves at the time of the incident, and the

dumpster wheels were not in the condition portrayed in the photograph at the time of the incident." Id. at 580. That court recognized that "[t]rial courts have broad discretion in determining the admissibility of photographs." Id. The court further stated that "[p]hotographs are admissible if they are relevant to a material issue. The photographs were admitted to show the general area where the crime took place. The state stipulated to the fact that the trees had leaves at the time of the incident and that there was a different dumpster there at the time." Id. (internal citations omitted). Ultimately, the Williams court held that the photographs may be admitted even though minor items depicted therein are different from those present at the time the incident occurs. Id.

In this case, the apartment in question was surrendered to the landlord and rented once again to a new tenant, who obviously possessed different furnishings. Thus, at the time the apartment was surrendered and prior to the change in furnishings, the importance of obtaining Exhibit J was yet unknown in that discovery from the State, including the photographs, was only received after the Grand Jury Indictment was returned and the apartment was surrendered. Thus, this case is the precise situation envisioned in fashioning the weight versus admissibility rule employed by the Courts; the differences in conditions can be explained while still respecting a party's right, specifically a criminal defendant's right to present evidence in their behalf.

Therefore, in light of the foregoing, Defendant submits that the trial court committed error in refusing to admit Exhibit J at trial in this matter. Any change in the furnishings of the apartment simply affects the weight given

to the photograph; it does not affect its admissibility. Matthew Eckhoff's testimony and his claimed observations were the focal point of the case and the primary matter in contention at trial. Moreover, the refused photograph fairly demonstrated Mr. Eckhoff's claimed line of sight, who was the sole eye-witness, and proved his observation was impossible to make because a wall obstructed his view. Thus, Ms. Jaco was precluded from cross-examining, confronting and contradicting the State's chief witness with this critical piece of evidence and presenting evidence in her own defense which resulted in her due process right and confrontation rights guaranteed by the United States Constitution and the Missouri Constitution were violated.

Photograph Exclusion Resulted In Prejudicial, Reversible Due Process Violation And An Impermissible Infringement on Defendant's Right to Confront Her Accuser

Next, after determining that error occurred, this Court must determine the prejudicial impact of the constitutional error. If the error is not harmless beyond a reasonable doubt, Ms. Jaco's conviction must be set aside and reversed. Olden v. Kentucky, 488 U.S. 227, 232-234 (1988). Once again, "[a] defendant's rights to confront and cross-examine witnesses and to call witnesses in his own defense are 'essential to due process and guaranteed by the Fourteenth Amendment'". State v. Samuels, 88 S.W.3d at 82.

In reviewing this type of error's damaging effect, this Court stated that:

> The correct inquiry is whether, assuming that the damaging potential of the cross-

> examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. at 684. "[T]he focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial." Id.

Similar to the case before this Court, reversible trial court error was present in Olden v. Kentucky. 488 U.S. 227 (1988). In that case, the defendant was convicted of forcibly sodomizing a young woman and he received a ten-year prison sentence. Id. at 230. The defense offered to the

jury was that the sexual activity between the defendant and the victim was consensual. Id. The defendant desired to confront the victim, who was the chief prosecution witness, with her current living arrangement in an effort to demonstrate her motive to fabricate her version of events, which was to protect her romantic relationship with her boyfriend at the time the act occurred, who was her live-in boyfriend at the time of trial, by claiming a rape occurred. Id. The trial court did not allow this cross-examination. Id.

The Olden Court recognized that the trial court possessed broad discretion to prevent repetitive and/or harassing cross-examination. Id. at 231. The Court also made reference to its holding in Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986), and reaffirmed its holding that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'" Id. The Court, in reversing the defendant's conviction, held that the victim's testimony "was central, indeed crucial, to the prosecution's case," that the victim's story was contradicted by the defendant and another witness, that the victim's story was corroborated only by her boyfriend's testimony, which was merely derivative from the victim, and the evidence against the defendant was not overwhelming. Id. at 233.

In Davis v. Alaska, 415 U.S. 308 (1974) a trial court's refusal to allow a defendant full cross-examination of a witness was examined by the Court. In that case, the defendant was convicted of grand larceny and burglary due

to his stealing a safe from a bar. Id. The witness in question testified that he observed the defendant along a road on two (2) separate occasions; one time with a crow bar in his hand. Id. at 310. The safe was later discovered opened, apparently pried upon with a crow bar. Id. at 309. This witness, at the time the identification was made and at the time of trial, was on probation to the juvenile court for burglary. Id. at 310-311. The prosecution sought a protective order preventing the defendant's cross-examination of the witness as to his delinquent past. Id. The prosecution's request was sustained. Id. at 311.

The Davis Court began its analysis by recognizing that the Confrontation Clause is something more than physical confrontation, but rather, and most importantly, the right to fully and effectively cross-examine the witness. Id. at 315. In fact, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Id. at 316. This right to cross-examine includes the opportunity to impeach, contradict and/or discredit the witness. Id. The Court recognized that the defendant was permitted to cross-examine the witness extensively, and in fact imply untruthfulness, but the defendant "was unable to make a record from which to argue why Green [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." Id. at 318. The Court further recognized, although the implications were present, that the limitations placed upon the cross-examination by not introducing the witness' criminal history likely resulted in the jury believing that the defendant "was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." Id.

The Court, in reversing the defendant's conviction, held that the defendant should not have been placed in the unfortunate position of appearing to propose speculative questions and the jury was entitled to have "the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof.'" Id. at 317. Because the witness' testimony involved the key elements in the prosecution, "[t]he claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer ... as well as of Green's possible concern that he might be a suspect in the investigation." Id. (internal citations omitted).

In the instant case before this Court, the one and only witness essential to the prosecution was Matt Eckhoff and therefore his credibility must be subject to close scrutiny. Matt Eckhoff's credibility, and thus Ms. Jaco's guarantee of due process, including her right to confrontation, contradiction and effective cross-examination, hinged on confronting Mr. Eckhoff with Exhibit J; it was the determining factor and involved undisputable physical evidence that would serve to completely impeach his testimony. In fact, confronting this sole eye-witness with this exhibit would have resulted in Ms. Jaco's exoneration. As such, the trial court's excluding Exhibit J resulted in a violation of Ms. Jaco's due process rights, including her right to present evidence and confront her sole accuser, and this error was not harmless beyond a reasonable doubt. Therefore, her conviction for Abuse of a Child must be set aside and held for naught and this matter must be remanded for a new trial.

Conclusion

Ms. Jaco prays that this Court grant this Application and Petition for Writ of Certiorari so that the questions presented may be fully considered and resolved. It remains Ms. Jaco's contention that facts considered in aggravation of punishment must satisfy the reasonable doubt standard when a jury's recommended sentence is the sentencing ceiling that a trial court may impose.

Further, the exclusion of the photograph constituted constitutional error mandating retrial in that it violated her right to a meaningful and full confrontation of the sole eye witness and infringed upon her right to present evidence in her defense.

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

March 1, 2005

Mr. Terry J. Flangan
Mr. John W. Peel
Suite 350
133 South 11th Street
St. Louis, MO 63102

In Re: State of Missouri, Respondent, vs. Christy L. Jaco, Appellant.
Missouri Supreme Court No. SC85594

Dear Counsel:

Please be advised that the Court issued the following order on this date in the above-entitled cause:

"Appellant's motion for rehearing overruled. Opinion modified on Court's own motion." Wolff, J., not participating.

A copy of the modified opinion of the Court is enclosed.

Very truly yours,

THOMAS F. SIMON

/s/
Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:
Mr. Breck K. Burgess/Office of the Missouri Attorney General

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)
	)
Respondent,	)
	)
v.	)No.SC85594
	)
CHRISTY L. JACO,	)
	)
Appellant.	)

APPEAL FROM THE CIRCUIT COURT OF STE. GENEVIEVE COUNTY
The Honorable Kenneth W. Pratte, Judge

A jury convicted Christy L. Jaco of abuse of a child for causing the death of her thirteen-month-old child in violation of section 568.060, RSMo 2000. Pursuant to section 557.036, RSMo Supp. 2003, the court bifurcated Jaco's trial. After the jury was unable to agree on the appropriate sentence during the penalty phase, the trial court sentenced Jaco to twenty years in prison. Because Jaco challenges the validity of section 557.036, this Court has exclusive appellate jurisdiction. Mo. Const. art. V, §. 3. The judgment is affirmed.

I. Facts

The facts, which this Court reviews in the light most favorable to the verdict, *State v. Christeson*, 50 S.W.3d 251, 257 (Mo. banc 2001), are as follows:

The victim was born on October 1, 2000, to Jaco and Jeremy Brooks. Shortly after the child was born,

Jaco's friends and acquaintances began noticing that the child suffered from numerous bruises. They observed that her child continued to incur bruises even after Jaco discontinued her relationship with Brooks and moved into an apartment with her new boyfriend, Matthew Eckhoff, and his two children in July of 2001. They also testified that Jaco "slapped" and "shook" her child when she became upset with him.

The acts that led to the child's death occurred on November 21, 2001. About 9:50 p.m., Eckhoff was cleaning the kitchen of the apartment, Jaco was getting ready for work, and the child, who was on the couch in the living room and had been suffering from bronchitis, became fussy and started crying. Eckhoff looked into the living room area from the kitchen and saw Jaco standing between the couch and the coffee table. He saw her lift up the child by placing her hands under his armpits and shake the child so violently that "his head rocked back about five or six times." Jaco then took the child to his bedroom, and Eckhoff heard "three pounds" against the bedroom wall. She then came out of the bedroom, closed the door nearly all the way, and told Eckhoff that the child was finally asleep. At that point, Eckhoff heard no other sounds coming from the child's room.

Around 10:15 or 10:20 p.m., Jaco left for work, and Eckhoff, who thought that the child was sleeping, laid down on the couch and began reading. Sometime between 11:20 a.m. and 12:30 a.m., Eckhoff heard the child coughing and got up to check on him. Upon discovering that the child was not breathing, Eckhoff performed mouth-to-mouth resuscitation and then called Jaco and 911. An ambulance soon arrived and transported the child to a local hospital, but he was later

transferred to Cardinal Glennon Children's Hospital in St. Louis.

By that time, he was in a coma. A CAT scan revealed that the child sustained serious brain injuries, which were consistent with being severely shaken. Other injuries included: blood in the back of his neck, which was consistent with a whiplash injury; two large bruises to his scalp; a bruise to his left cheek; marks, scrapes, and abrasions to the back of his head; a brown bruise under his left eye; a bruise to his left jaw; two parallel red lines on the back of his head; a red abrasion on his scalp; a mark with a circular pattern of little dots around the outside of it on his forehead; bruises on his thighs; an old injury to his penis; a fractured clavicle, which was "between one week [and] one month old" and was also consistent with being severely shaken; a fractured right tibia, which was "between two weeks and two months old" and was consistent with an injury caused by twisting the child's ankle; and a red mark on the palm of his left hand. On November 23, 2001, the child was declared legally dead. An autopsy revealed that he died of a closed head injury.

II. Photograph Exhibit

Jaco first alleges that the trial court erred in refusing to admit a photograph, which she claims was the only photograph tendered by either party that accurately demonstrated Eckhoff's vantage point from the kitchen while he watched the shaking incident in the living room.

At trial, the state presented several photographs of the apartment, taken shortly after the offense, purporting to show that Eckhoff would have had a clear view of Jaco shaking the child from Eckhoff's location in the kitchen. Thereafter, during the testimony of Jaco's

father, Jaco offered into evidence Defense Exhibit J, the photograph in question, which was taken in the living room after Jaco and Eckhoff had vacated the premises and about a year and a half after the offense. The prosecutor objected to the photograph on the grounds that it was not an accurate representation of the apartment at the time of the offense and that the apartment now had different furniture that made the photograph confusing. In a conference out of the hearing of the jury, Jaco's counsel admitted that the furniture in the apartment had changed by a different tenant, but argued that the photograph was still admissible because the walls and the layout of the apartment had not changed. The trial court sustained the objection, finding the photograph inadmissible because the different furnishings threw everything "out of kilter" so that the photograph was "misleading."

Photographs are admissible if they accurately and fairly represent what they purport to depict and tend to prove or disprove any elements of the charged offense. *State v. Middleton*, 995 S.W.2d 443, 462 (Mo. banc. 1999). They must show relevant facts that will aid the jury. *State v. Stephens*, 708 S.W.2d 345, 350 (Mo. App. 1986); *State v. Shipman*, 568 S.W.2d 947, 054 (Mo. Ct. App. 1978). In general, differences in the conditions of the subject depicted between those conditions existing at the time of the crime and those at the time the photograph was taken go to the weight of the evidence, not admissibility. *Id.* However, photographs in which the different conditions are confusing or misleading should be rejected. *See, e.g., Jordan v. Abernathy*, 845 S.W.2d 86, 88 (Mo. Ct. App. 1993); *Bellistri v. City of St. Louis*, 671 S.W.2d 405, 407 (Mo. Ct. App. 1984).

Ultimately, the determination of the admissibility of photographs lies in the sound discretion of the trial court. *State v. Ervin*, 979 S.W.2d 149, 161 (Mo. banc 1998).

On the record before us, it cannot be said that the trial court abused its discretion in refusing to admit Defense Exhibit J. It is difficult to determine from the photograph where Jaco was standing when she shook the child, and that difficulty is due in large part to the fact that the furniture used by Eckhoff to describe where Jaco was standing is not shown. As a result, the photograph would have provided neither the judge nor the jury a frame of reference from which they could have determined whether the photograph fairly and accurately demonstrated the line of sight between the kitchen and the precise point in the living room where the incident occurred. Even though changes in the condition of the scene depicted generally go to the weight of the evidence rather than admissibility, the trial court was well within its discretion in determining that the changes or discrepancies here would confuse and mislead the jury rather than aid the jury. The point is denied.

III. Profile Evidence

Jaco next alleges that the trial court abused its discretion by refusing to allow her counsel to cross-examine Dr. Martin Keller, a doctor who treated the victim, and Dr. Jane Turner, a doctor who conducted the autopsy, about profile evidence - scientific studies and statistics concerning the propensities of different types of persons to abuse children.

According to Jaco's offer of proof, Dr. Turner, drawing on her experience and review of certain studies published in authoritative treatises, journals and periodicals, would have testified:

a) That children living in households with one or more male adults not related to them are at an increased risk for maltreatment, injury or death. Moreover, that these same children were subjected to abuse or even death as a result of shaking or blunt trauma.

b) That scientific studies demonstrate that children living in households with adult men unrelated to them are eight (8) times more likely to die of abuse than children living with one or both biological parents.

c) That most perpetrators of shaking and/or blunt trauma to children are unrelated males.

d) That [a] risk factor for infant children being abused is where the child is living with a stepfather or the mother's boyfriend.

e) That scientific studies have established that a common accidental injury explanation/defense offered by perpetrators is that the baby was in some form of distress, choking or not breathing and the perpetrator mildly shook the baby in a vain effort to revive the baby.

Expert testimony relating to profile evidence is admissible in the discretion of the trial court to describe behaviors and characteristics commonly observed in victims, *e.g., State v. Silvey*, 894 S.W.2d 662, 671 (Mo. banc 1995) (expert testified that he had observed several behavioral indicators in victim that were consistent with sexual abuse), or to determine the cause of an injury to a victim, *e.g. State v. Candela*, 929 S.W.2d 852, 865-66

(Mo. Ct. App. 1996) (expert testified that victim suffered from shaken baby syndrome). However, profile evidence is not admissible to show a defendant's responsibility for injury to a victim. *See id.* at 866. This victim/defendant distinction is necessary to accommodate the general rule that while an expert may express an opinion regarding an ultimate issue in a case, the expert may not express an opinion on the guilt or innocence of the defendant. *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984). To do so, of course, would be to invade the province of the jury. *Id.*

In acknowledgment of this rule, Jaco claims that the profile evidence here "would not result or include any question that constituted an opinion of [her] guilt or innocence [and that] the evidence offered did not involve expert testimony involving any claim that [she] or Mr. Eckhoff was responsible for the injuries in question or not responsible." However, the evidence does just that. The clear inference is that an unrelated male who lived with the child, such as Eckhoff, was statistically more likely to have been responsible for the child's injuries than a related female, such as Jaco. This is indeed a comment that Eckhoff is more likely to be guilty and, conversely, that Jaco is more likely to be innocent. As such, the evidence was inadmissible.

IV. Constitutionality of Section 557.036

The next claim is that the trial court erred in refusing to declare section 557.036 facially unconstitutional and proceeding with a bifurcated trial. Section 557.036.3, as amended in 2003, provides:

> If the jury at the first stage of a trial finds the defendant guilty of the submitted

offense, the second stage of the trial shall proceed. The issue at the second stage of the trial shall be the punishment to be assessed and declared. Evidence supporting or mitigating punishment may be presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. The court shall instruct the jury as to the range of punishment authorized by statute for each submitted offense. The attorneys may argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The jury shall assess and declare the punishment as authorized by statute.

Jaco first contends that section 557.036 is invalid because it does not identify a standard of proof for the jury to use in reviewing evidence presented in the penalty phase; rather, it merely requires jurors simply to agree on the punishment they assess. Jaco explains that any fact that warrants a punishment other than the lowest available in the range of punishment must be found beyond a reasonable doubt, citing *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). However, neither of these cases held that a jury is required to find facts beyond a reasonable doubt to impose a sentence that is within the unenhanced range of punishment for an offense. *Ring* and *Apprendi* merely held that facts that are the functional equivalent of elements of offenses, such as statutory aggravating circumstance that is required for eligibility for the death penalty, must be found beyond a reasonable doubt by a jury. *Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 482-83. In the present case, Jaco's 20-year sentence was within the original, unenhanced range of punishment, which was 10 to 30 years or life imprisonment. Therefore, any facts that would have tended to assess her punishment within this range were not required to be found beyond a reasonable doubt by a jury.

Jaco also argues that section 557.036 is unconstitutional because it fails to require the state to give notice to the defense of penalty phase evidence and witnesses. However, in criminal cases, there is no general right of discovery, and the only disclosure that must be provided to a criminal defendant is that which is required under Rule 25 pertaining to discovery in criminal cases. *State v. Wood*, 719 S.W.2d 756, 759 (Mo. banc 1986). Furthermore, contrary to Jaco's

assertion, the Due Process Clause does not mandate disclosure of penalty phase evidence or witnesses. The Due Process Clause merely requires that defendants not be compelled to give disclosure if they are not given reciprocal discovery rights, *Wardius v. Oregon*, 412 U.S. 470, 474-76 (1973), and that the state is required to disclose exculpatory evidence that might be material to the outcome of a case, *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Finally, even if there was a due process penalty phase disclosure requirement, in this case, Jaco was not prejudiced because several months before trial the state did in fact endorse as witnesses the four persons who testified in penalty phase.

Next, Jaco maintains that section 557.036 unconstitutionally permits the introduction of character evidence where the defendant has not otherwise injected his or her character into the case during trial. However, Jaco does not explain just how or why that evidence is unconstitutional in a penalty phase setting. In any event, this Court has repeatedly held that both the state and the defendant may introduce any evidence pertaining to the defendant's character in order to help the jury assess punishment in a penalty phase setting, *e.g.*, *State v. Winfield*, 5 S.W.3d 505, 515 (Mo. banc 1999), even where the evidence constitutes unadjudicated bad acts, *e.g.*, *State v. Ferguson*, 20 S.W.3d 485, 500 (Mo. banc 2000).

Jaco's next claim is that the legislature violated the separation of powers doctrine in enacting section 557.036, which Jaco characterizes as a procedural change in the law, because those matters are preempted by this Court's rules involving the same procedures. When a conflict exists between this Court's rules and a statute,

"the rule always prevails if it addresses practice, procedure or pleadings." *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995). Although this Court has promulgated numerous rules pertaining to the conduct of trials in criminal cases, *see* Rules 27.01-27.09, none of those rules address whether a two-phase trial is permitted in a non-death penalty case. Therefore, section 557.036 is not inconsistent with any of those rules.

Alternatively, and inconsistently, Jaco argues that section 557.036 is not a procedural law but a substantive law that could not be applied retroactively in that her crime occurred before the amendment of section 557.036. "Procedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights." *Wilkes v. Mo. Highway and Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988). The distinction is that "substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit." *Id.* Section 557.036 is clearly a procedural law. Application of this statute was proper.

V. Jaco's Proffered Instruction

Finally, Jaco alleges that the trial court erred in refusing to submit her non-MAI Instruction "A," which would have required the jury, among other things, to "find beyond a reasonable doubt that aggravating circumstances exists [sic], taken as a whole to impose punishment in excess of ten (10) years in the Department of Corrections." Having already rejected her argument that the jury had to find aggravating circumstances beyond a reasonable doubt in order for her to receive

more than the minimum sentence, this Court holds that the trial court did not err in refusing to submit this instruction. A decision of a trial court not to submit an incorrect instruction cannot be error. *State v. Parkhurst*, 845 S.W.2d 31, 36-37 (Mo. banc 1992).

VI. Conclusion

For the foregoing reasons, the judgment is affirmed.

_____

_____Stephen N. Limbaugh, Jr., Judge

White, C.J., Stith, Price, Teitelman and
Russell, JJ., and Blackmar, Sr. J., concur.
Wolff, J., not participating.

IN THE SUPREME COURT
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	Appellate No.SC85594
	)	
CHRISTY JACO,	)	
	)	
Appellant.	)	

APPELLANT'S MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT

COMES NOW Appellant, Christy Jaco, by and through her attorney, Terry J. Flanagan, P.C., and for her Motion for Reconsideration states the following to this Honorable Court:

1. That this court issued its decision in this cause on or about January 11, 2005 whereby it affirmed Ms. Jaco's conviction for Abuse of a Child and thereby affirmed the twenty (20) year sentence imposed by the trial court.
2. That said decision, by affirming the conviction, held that Defendant's Exhibit J, the photograph exhibit, was properly refused and/or the trial court did not abuse its discretion in denying the admission of same.
3. That said decision, by affirming the conviction,

also held that Section 557.036 of the Missouri Statutes was not unconstitutional as argued by Appellant.

4. That Ms. Jaco submits that the Court's decision overlooks or misinterprets material matters of law or fact and/or fails to consider the far reaching aspects and general importance of its holding including, but not limited to, the following:

   a. First, the decision provides that Defendant's Exhibit J appears to have been taken in the middle of the apartment living room and this conclusion is explicitly and directly relied upon by this Court in arriving at its decision. However, this conclusion is contradicted by Defendant's offer of proof at the time the photograph was tendered. Specifically, Defendant informed the trial court that an investigator would be available to testify as to the precise location that the photograph was taken and would, in fact, state that the photograph was taken at the precise location where Mr. Eckhoff claims Ms. Jaco stood at the time he claims to have witnessed this shaking. This location was the result of Mr. Eckhoff's deposition testimony and the location was determined to be between the couch and coffee table previously in the apartment. Measurements were taken and the location was selected. Moreover, this same investigator would also testify that the photograph was not taken from "the middle

of the living room." The offer to present this evidence was refused and the evidence disallowed by way of the photograph or testimony of the investigator or Mr. Eckhoff by referring to same.

b. Further, Ms. Jaco submits that the above conclusion is rebutted by comparing the photographs set forth in Appendix to Appellants Brief pages A1 and A2. It is clear from that comparison that Defendant's Exhibit J was not, in fact, taken from the middle of the living room. It must be noted that such a conclusion was never argued by the State at trial nor relied upon by the trial court in denying the photograph's admission. Ms. Jaco further submits that in comparing the photographs in question it is clear that the State's photographs, and not the defendant's photograph, were more likely taken from the middle of the living room.

c. Next, the decision provides that Ms. Jaco did not question Mr. Eckhoff to establish where Ms. Jaco was standing in the room in relation to the new tenant's furniture. Such a statement completely ignores the offer of proof and specific request to do just that. Specifically, on the page 691 of the transcript it was requested by Ms. Jaco to recall Mr. Eckhoff to question him about this particular photograph and the trial court ruled that such a right to confront a witness and introduce evidence would not

be allowed.

d. Next, the decision provides that "where Jaco was standing is not shown in the photograph." It would be impossible to show where Mr. Eckhoff claims Ms. Jaco was standing in this photograph when it was taken from where he claims she was standing in an effort to establish Mr. Eckhoff's line of sight, or lack thereof, from the two respective locations. In other words, in order to show Ms. Jaco's purported "location" the photographer would be required to point the camera straight down. In fact, Defendant submits that no photograph depicting a line of sight shows where the individual was standing because the photograph is offered to show a line of sight not the floor upon which the individual stands; thus, vantage point is depicted but the location is not.

e. Lastly as it concerns the photograph, Ms. Jaco requests that this Court address her claim of a Due Process violation including her right to confront witnesses and her right to present evidence in her defense. The decision does not, in any manner, address her constitutional rights to present evidence in attacking and defending against the allegations lodged.

f. As and for the constitutionality of 557.036, the decision fails to address the importance of and the role a jury recommended sentence plays in this matter. It was argued

by Ms. Jaco, and it is not contested, that the law provides that she is entitled to a jury recommended sentence. This jury recommendation would serve as the maximum sentence that a trial court may impose; in other words the jury's recommendation is the sentencing ceiling.

g. The court's conclusion that the United States Supreme Court holdings in Ring and Apprendi do not require a jury to find facts beyond a reasonable doubt to impose a sentence that is within the unenhanced range of punishment for an offense is misapplied. In fact this misapplication is highlighted by the Court's holding in United States v. Booker. — S.Ct. —, 2005 WL 50108, U.S., Jan. 12, 2005. That Court echoed its prior holding that "[f]oreshadowing the result we reach today, we noted that our holding was consistent with a 'rule requiring jury determination of facts that raise a **sentencing ceiling**' in state and federal sentencing guidelines systems." Id. at pg. 6 *citing* Jones v. United States, 526 U.S. 227, 230 (1999) (emphasis added).

h. In fact, the Booker Court interpreted its Ring decision as requiring any fact that increases a defendant's authorized punishment and therefore sentence must be found by a jury beyond a reasonable doubt when it quoted that holding stating that "'[i]f a State makes an increase in a

defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt.' Our opinion made it clear that ultimately, while the procedural error in Ring's case might have been harmless because the necessary finding was implicit in the jury's guilty verdict, 'the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury.'" Booker, page 7.

i. The Booker Court further interpreted its prior holdings in Jones, Apprendi and Ring and stated that the defendant has a Sixth Amendment right to "have the jury find the existence of 'any particular fact' that the law makes essential to his punishment." Booker, page 7. It cannot be contested that Section 557.036 allows and permits evidence in aggravation which is then essential to arriving at the proper punishment.

j. It must be noted that the law does not provide that the jury's recommended sentence would be advisory only; rather the law provides that the jury's recommended sentence would serve as the sentencing ceiling. Thus, this situation does, in fact, invoke the Sixth Amendment when the United States Supreme Court held that "[i]f the Guidelines as currently written could be

read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentencing within a statutory range." Booker, page 8. In other words, the trial court in Jaco's case possesses broad discretion in imposing a sentence between the statutory minimum and the jury recommended sentence, which serves as the ceiling. However, the facts relied upon in arriving at the ceiling must be proven beyond a reasonable doubt.

k. It cannot be contested that Ms. Jaco is statutorily entitled to a jury recommended sentence which would then serve as the maximum sentence the trial court could then impose. Thus, as the United States Supreme Court has repeatedly held, any fact that serves as an element of an offense which is used in aggravation of punishment must be submitted to a jury and must be found beyond a reasonable doubt.

l. This is not the case where the jury received the proper instruction as to the burden of proof nor a case where the State did not present evidence in aggravation of punishment. If either of these two (2) possibilities occurred, this argument would be inapplicable and misplaced.

m. However, the State did present evidence in aggravation of punishment in an effort to increase the jury recommended sentence and thereby raise the sentencing ceiling. See Booker, page 6 *citing* Jones v. United States, 526 U.S. 227, 230 (1999) (stating that "[f]oreshadowing the result we reach today, we noted that our holding was consistent with a 'rule requiring jury determination of facts that raise a **sentencing ceiling**' in state and federal sentencing guidelines systems.") (emphasis added).

n. Thus, the Sixth Amendment requires that the jury be instructed that it must hear and determine the existence of evidence in aggravation beyond a reasonable doubt in arriving at its sentence. This Court's opinion completely ignores and fails to recognize the jury's recommended sentence and the Sixth Amendment requirements in arriving at its conclusion in this matter and therefore Ms. Jaco requests that this Court address same.

WHEREFORE, Appellant prays for an Order and Judgment of this Court setting aside its January 11, 2005 Opinion, entering an Order and Judgment setting aside Ms. Jaco's conviction of Abuse of a Child, an Order remanding this matter to the trial court for retrial, and for such other Orders and relief that this Court deems just and proper in the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing Motion for Reconsideration was [ ] mailed via U.S. mail, first class, postage prepaid, [ ] hand-delivered, [ ] transmitted via facsimile this ___ day of _____, 2005 to: Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.